Supreme Court, U.S.
FILED

No. 05-949

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In The
Supreme Court of the United States

LINDOYLE BRYANT
a/k/a Cubby,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Fourth Circuit Court of Appeals err in not addressing the statutory error component of a *Blakely/Booker/Fanfan* claim of error, such that petitioner is entitled to remand for imposition of a sentence under an advisory application of the guidelines?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

OPINION IN THE CASE BELOW 1

STATEMENT OF THE BASIS OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

ARGUMENT AMPLIFYING REASONS FOR WRIT 7

THE FOURTH CIRCUIT ERRED IN NOT ADDRESSING THE STATUTORY ERROR COMPONENT OF A *BLAKELY/BOOKER/FANFAN* CLAIM OF ERROR, AND THIS COURT SHOULD FIND THAT PETITIONER IS ENTITLED TO REMAND FOR IMPOSITION OF A SENTENCE UNDER AN ADVISORY APPLICATION OF THE GUIDELINES 7

CONCLUSION 12

APPENDIX ..... ia

TABLE OF CITED AUTHORITIES

PAGE(S)

CASES:

Arizona v. Fulminante,
499 U.S. 279 (1991) 8

Blakely v. Washington,
542 U.S. 296 (2004) ..... *passim*

United States v. Barnett,
398 F.3d 516 (6th Cir.), *cert. dismissed*,
__ U.S. __, 126 S. Ct. 33 (2005) 9

United States v. Booker,
543 U.S. 220, 125 S. Ct. 738 (2005) ..... *passim*

United States v. Bryant,
153 Fed. Appx. 148,
2005 WL 2857968 (4th Cir. 2005) 1

United States v. Cole,
27 F.3d 996 (4th Cir. 1994) 9

United States v. Dominguez Benitez,
542 U.S. 74 (2004) 8

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 10

United States v. Riggs,
410 F.3d 136 (4th Cir. 2005) 10

United States v. Rodriguez,
__ F.3d __ (4th Cir. 2006),
2006 WL 9602 ..... 7, 8

United States v. White,
405 F.3d 208 (4th Cir.), *cert. denied*,
__ U.S. __, 126 S. Ct. 668 (2005) 7, 8, 9

CONSTITUTIONAL PROVISION:

U.S. CONST. amend. VI 6, 7, 8

STATUTES:

18 U.S.C. § 3231 5

18 U.S.C. § 3553 ..... 3, 4

18 U.S.C. § 3553(a) 10, 11, 12

18 U.S.C. § 3553(a)(1) 3, 10, 11, 12

18 U.S.C. § 3553(a)(2) 3, 10, 11, 12

18 U.S.C. § 3553(b)(1) (Supp. 2004) 2

18 U.S.C. § 3553(c)(2) 10

21 U.S.C. § 841 5

21 U.S.C. § 846 5

28 U.S.C. § 1254(1) 1

RULE:

Va. Sup. Ct. R. 10(a) 1

GUIDELINE:

U.S.S.G. § 2D1.1 6

OPINION IN THE CASE BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is an unpublished per curiam opinion in United States of America v. Lindoyle Bryant, case no. 04-4015. The decision is reported as *United States v. Bryant*, 153 Fed. Appx. 148, 2005 WL 2857968 (4th Cir. 2005). A copy of the slip opinion is included in the appendix to this petition, at 1-5.

STATEMENT OF THE BASIS OF JURISDICTION

The judgment sought to be reviewed in this case is the decision of the United States Court of Appeals for the Fourth Circuit in case no. 04-4015, decided by unpublished per curiam opinion, dated November 1, 2005. *See* Appendix, at 1-5.

The United States Supreme Court has jurisdiction to review this decision upon a writ of certiorari pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction by writ of certiorari granted upon the petition of a party to a criminal case after rendition of judgment in a court of appeals. This petition is filed pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States and addresses a decision of the United States Court of Appeals for the Fourth Circuit (1) in conflict with other decisions of the Fourth Circuit and of other United States courts of appeals and (2) which so far departed from the accepted and usual course of judicial proceedings, and which sanctioned such a departure by the district court, as to call for an exercise of the supervisory power of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

The question presented in this case addresses the statutory error, pursuant to *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), of imposing a sentence based on a mandatory, rather than advisory, application of the federal sentencing guidelines in the district court, an application of the guidelines which was affirmed by the Fourth Circuit on appeal.

Part of the statute at issue is the pre-*Booker* version of 18 U.S.C. § 3553(b)(1) (Supp. 2004), which states:

> **(b) Application of guidelines in imposing a sentence.** –
>
> **(1) In general.**–Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an

> applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

This portion of 18 U.S.C. § 3553 which governs imposition of a sentence was deemed incompatible with the constitutional holding of *Booker* and has been severed and excised from the statute. *See Booker*, 543 U.S. at __, 125 S. Ct. at 756-65.

The other part of the statute at issue in this case is 18 U.S.C. § 3553(a)(1), (2), which provides:

> **(a) Factors To Be Considered in Imposing a Sentence.** – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

This portion of 18 U.S.C. § 3553 remains in full force and effect following *Booker*, and in fact must be considered by the sentencing judgment under the advisory guidelines regime established by *Booker*.

STATEMENT OF THE CASE

Petitioner, Lindoyle Bryant, was charged with two offenses in violation of 21 U.S.C. §§ 841 and 846. In the United States District Court for the District of South Carolina, Charleston Division, a jury convicted him of both charges, and United States District Judge David C. Norton sentenced him to concurrent terms of 151 months in prison for each offense.

On appeal, petitioner raised certain evidentiary questions with respect to his conviction and sentence, but he also asserted that his sentence violated the principles announced in *Blakely v. Washington*, 542 U.S. 296 (2004), decided by the United States Supreme Court after his sentence was imposed. After the filing of the briefs in this appeal in the Fourth Circuit, the United States Supreme Court decided *Booker*, extending the holding of *Blakely* to the federal sentencing guidelines. The Fourth Circuit rejected petitioner's challenge to his sentence under *Blakely*, finding no constitutional error, but the court failed to address the additional component of the *Booker* analysis – the district court's mandatory rather than advisory application of the sentencing guidelines. *See* Appendix, pp. 4-5.

Basis for Federal Jurisdiction in the Court of First Instance

Petitioner was charged with violations of 21 U.S.C. §§ 841 and 846. The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231, which grants original jurisdiction to the district courts of all offenses against the laws of the United States.

Facts Material to Consideration of the Question Presented

This case was tried August 26-27, 2003, and the defendant was sentenced December 23, 2003. The defense objected to the pre-sentence report, specifically to its finding attributing to the defendant 19 kilograms of cocaine rather than the lesser quantity charged in the indictment and at issue in the drug transaction for which he was on trial. On appeal, he raised the same objection but added an additional ground based on the intervening decision in *Blakely*, decided June 24, 2004. The drug quantity finding of 19 kilograms resulted in an increase in the base offense level from 32 (at least 5 kilograms but less than 15 kilograms) to 34 (at least 15 kilograms but less than 50 kilograms), *see* U.S.S.G. § 2D1.1, and further resulted in an increase in the guideline range from 121 to 151 months to 151 to 188 months. Because the sentence imposed – 151 months – was within the range that would have applied without this finding of the greater drug quantity, the Fourth Circuit found there was no Sixth Amendment violation. *See* Appendix, p. 4-5. However, the Fourth Circuit failed to address the other component of a *Blakely* challenge – whether there was a statutory *Booker* violation which resulted from the mandatory application of the guidelines.